IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

EDWARD J. GAY PLANTING & MANUFACTURING CO., LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Gay failed to establish the actual cost of the commodity processed.

2. In modifying the plain and unambiguous language of paragraph 11 of the stipulation by combining it with paragraphs 7 and 9 of the stipulation; whereas, in fact each paragraph stands alone.

3. In holding that the margin should be computed by using the current market value of the commodity at the time of processing (Sec. 907 (b)(5)(b); instead of by using the actual cost of the commodity processed (Sec. 907 (b)(5)(a).

ARGUMENT.

Analysis of the Stipulation.

The stipulation appearing on pages 48 through 53 of the record contains eighteen (18) paragraphs. Each paragraph contains a certain set of facts, complete in itself; and, not in conflict with facts contained in other paragraphs. An analysis of the various paragraphs discloses:

Paragraph 1. That Gay was subject to the tax; paid the tax; filed a refund claim which was denied; and filed a petition with the United States Processing Tax Board of Review.

Paragraph 2. Describes the contents of the claim for refund.

Paragraph 3. States the duration of the tax period.

Paragraph 4. Sets forth the type of sugar produced and the marketing conditions.

Paragraph 5. Determines the Gross Sales Value for margin computation purposes.

Paragraph 6. States the number of units processed in each period.

Paragraph 7. Describes the accounting procedure of Gay and reads:

> "That the petitioner processed sugar cane which it grew on its own plantation and sugar cane which it purchased in the open market from other planters; that the books and records of the petitioner were departmentalized, segregating its agricultural operations (the production of sugar cane) from its factory operations (the conversion of own-grown cane and purchased cane into sugar products); that cane purchased from other planters was charged to its factory operations at the actual cost of such purchases delivered to the factory; that the actual cost of cane purchased by petitioner was the same as the current market price at time of processing of cane of like grade and quality

in the markets where the petitioner customarily made its purchases; that cane grown on its own plantation was charged to its factory operations at the current market price of sugar cane of like quality and grade; and that such charges, appearing in the factory operations of the petitioner, were used by the petitioner as the cost of commodity processed during the respective periods in its claim for refund as filed."

Paragraph 8. Stipulates the cost of the commodity for the several periods pursuant to Section 907 (b)(5)(b) of the Revenue Act of 1936.

Paragraph 9. Describes the crop season and Gay's farm accounting procedure. It reads:

"That sugar cane grown on the Petitioner's plantation is planted during September and October and is harvested during the months of October to December, inclusive, of the following year; that, in addition to the crop which is harvested thirteen or fourteen months after planting, there are second and third cuttings in subsequent years from that same planting; and that all costs incidental to the planting and cultivation of the crop are charged against the first harvest, no costs being deferred as applicable to the second and third cuttings."

Paragraph 10. Describes the benefit payments received under the Agricultural Adjustment Act.

Paragraph 11. Stipulates the actual cost of the commodity processed for the several periods on the basis of including and excluding benefit payments, pursuant to Section 907 (b)(5)(a) of the Revenue Act of 1936; and reads:

"That the petitioner's cost of commodity processed, using the cost of growing cane as reflected by the portion of its books and records dealing with agricultural operations plus the actual cost of cane purchased by petitioner from other planters, was $167,969.33 during the tax period and $248,096.04 during the period before and after the tax; that the benefit payments received by the petitioner from the Secretary of Agriculture

were treated as income on that portion of its books and records dealing with agricultural operations; and that, should such payments be held to serve as a reduction of the cost of growing cane, the petitioner's cost of commodity processed was $115,890.47 during the tax period and $248,096.04 during the period before and after the tax."

Paragraph 12. Stipulates the increase in cost of processing.

Paragraph 13. Establishes the final disposition date of the processed sugar.

Paragraph 14. Stipulates the billing of tax on molasses and the taxpayer's practice following the invalidation of the tax.

Paragraph 15. Stipulates that the Secretary of Agriculture made no payments under Section 8, Par. 7 of the Agricultural Adjustment Act as amended.

Paragraph 16. Provides that there is no agreement or understanding whereby Gay may be relieved of the tax.

Paragraph 17. Determines that Gay sold its sugar with a guarantee against price decline.

Paragraph 18. Stipulates that Gay did no processing during the period February 1 to July 31, 1936.

The paragraphs of the stipulation are numbered—each covers a set of related facts. No paragraph is dependent upon another to determine a fact. The issue was clearly presented to the Court. If the Fifth Circuit held—as it later did in *Commissioner* v. *Bain Peanut Co.* (*supra*)—that actual cost if determinable from the books was exclusive Gay was expected to recover under paragraph 11. If the Circuit Court had held that the bookkeeping method described in paragraph 7 was controlling, then Gay could not recover.

Paragraph 11 was drawn to meet the requirements of Section 907 (b)(5)(a), that is, the cost was reflected in the

accounting procedure. That must be obvious. Otherwise the paragraph served no purpose because the other cost permitted by statute was already stipulated in paragraph 8.

It is clear that the Court erred in holding that the taxpayer has failed to establish cost pursuant to Section 907 (b)(5)(a).

Effect of the Stipulation.

"An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the affect of a confessatory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—i.e. ceremonial or formal—or *judicial admission, or stipulation.* It is, in truth, a substitute for evidence, in that it does away with the need for evidence." *Wigmore* on Evidence (Third Edition, Section 2588 and authorities cited therein).

The Court below by linking paragraphs 7 and 9 to paragraph 11 substituted a state of facts not encompassed in the stipulation. Unless counsel can rely upon the court's acceptance of a stipulation as stipulated, one of the greatest keystones of our jurisprudence is in jeopardy.

"The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, i.e., the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it." *Wigmore* on Evidence (Third Edition, Section 2590 and authorities cited therein).

Not only may the party adversely affected offer no evidence to dispute it, but the party benefiting may be precluded from offering testimony, because it is now immaterial, may encumber the record, and he may not be entitled to the dramatic force which might be gained from an examination of the witness. *Wigmore* on Evidence (Third Edition, Section 2591).

With Counsel so strongly bound by a stipulation—even one made by an adversary to soften the impact of damaging testimony—how can a court go beyond the fact and create a new set of facts by linking several stipulated but unrelated facts? If Counsel for the parties had intended—or desired—to associate the paragraphs, they could have done so by reference. The Court cannot do for Counsel what Counsel has failed to do for himself. To permit such a practice places opposing counsel in the position of being unable to adduce opposing testimony because the trial has terminated.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX.

Revenue Act of 1936, 49 Stat. 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Sec. 902. CONDITIONS ON ALLOWANCE OF REFUND.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

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Sec. 906. PROCEDURE ON CLAIMS FOR REFUND OF PROCESSING TAXES. (49 Stat. 1750)

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(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the

proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. EVIDENCE AND PRESUMPTIONS. (49 Stat. 1751)

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: